(2)

No. 04-568

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA,

Petitioner,

v.

MYRON FRANKLIN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

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QUESTION PRESENTED

I.. Whether the decision by the Fourth District Court of Appeal in Franklin v. State, 876 So. 2d 607 (Fla. 4th DCA 2004), conflicts with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and California v. Prysock, 453 U.S. 355, 360, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981), by violating the Court's holding that no talismanic incantation is required in conveying to a suspect what his rights are under Miranda?

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Case No. 04-568

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF FLORIDA, Petitioner

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MYRON FRANKLIN, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE FOURTH DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

OPINION BELOW

The opinion below has been reported at Franklin v. State, 876 So. 2d 607 (Fla. 4th DCA 2004).

CONSTITUTIONAL PROVISIONS

Respondent accepts Petitioner's advancement of relevant constitutional provisions.

JURISDICTION

Respondent opposes Petitioner's invocation of this Court's jurisdiction as there are independent state grounds for denying it. Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Article I, §9, Fla. Const. Provides that,

> No person shall be deprived of life, liberty or property, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself.

The Supreme Court of the State of Florida has held that this state constitutional provision mandates that a criminal suspect, prior to being questioned during a custodial interrogation, be warned that he or she has "a right to a lawyer's help," and that such a right means that the suspect has the right, under the Florida Constitution, to consult with a lawyer before being interrogated and to have the

lawyer present during interrogation. Traylor v. State, 596 So. 2d 957, 965-66 n.13 (Fla. 1992). The instant case is a direct review of a state court decision and, thus, this Court is reviewing the judgment. Coleman v. Thompson, supra at 730, 111 S.Ct. at 2554. Consequently, there is nothing for this Court to do, with regard to the judgment at bar, since this Court's resolution of the federal constitutional question regarding Miranda[1] rights and the United States Constitution Fifth Amendment will leave unaffected the decision, below, under Florida constitutional principles. See Cooper v. California, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730, 734 (1967) (State's are free to establish higher standards for police practices which impact on individual rights).

STATEMENT OF THE CASE

Respondent accepts Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent accepts Petitioner's Statement of the Facts, subject to additions or qualifications to be addressed by Respondent in his Reasons for Denying the Writ Petition.

REASONS FOR DENYING THE WRIT PETITION

Contrary to the assertion by the State of Florida (hereinafter referred to as the "State"), the case at bar will not provide this Court with an opportunity to resolve any apparent conflicts of law among the United States Circuit Courts of Appeal concerning the adequacy of Miranda warnings. This is so for two reasons. First, there is no substantive split among the Circuit Courts of Appeal with regard to the necessity that a Miranda rights recitation must impart a warning, without any

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

limiting language, that a criminal suspect has a right to the presence of a lawyer during a custodial interrogation. Second, the facts at bar, concerning the Miranda rights provided to Mr. Franklin, failed to comport with the minimum necessary requirements of either Miranda v. Arizona, supra, or California v. Prysock, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981). The warning given to him, "You have the right to talk with a lawyer before any questioning," was an improper limitation on the warning mandated by Miranda and wrongly informed Respondent that he did not have the right to have a lawyer present during his custodial interrogations. The decision of the Fourth District Court of Appeal of the State of Florida (hereinafter referred to as the "Fourth District"), with regard to the Miranda warning at bar, is consistent with the requirements of Miranda v. Arizona, supra, and the standard of review of Miranda warnings, as announced in California v. Prysock, supra. This Court need not issue a writ of certiorari, because there is no important question of federal constitutional law to be resolved; nor is there any actual conflict among the United States Circuit Courts of Appeal. C.f. 28 U.S.C. § 1257; Rule 10 of the Rules of the Supreme Court of the United States.

In Miranda v. Arizona, supra, this Court specifically stated that,

> Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system of protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can by used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that he accused was aware of this right.

Id., at 471-472, 86 S.Ct. at 1626. Based on this holding, the State's complaint that the Fourth District's decision "artificially inflates the significance of the word "'during'" is wholly without merit.

Petitioner wrongly contends that this Court's dictate of California v. Prysock, supra, that "'no talismanic incantation is required' to satisfy the Miranda requirement," id., at 359, 101 S.Ct. at 2809, supports a warning which limits the right to speak to a lawyer only before the commencement of a custodial interrogation. The facts of Prysock show that the accused, in that case, had been specifically warned, "You have the right to a lawyer before you are questioned, have him present with you while you are being questioned, and all during the questioning. Do you understand this?" Id. at 357, 101 S.Ct. 2808. Similarly, the defendant in Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166 (1989), was warned that he had, "a right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning," that, "If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time," and "You have a right to stop answering at any time until you've talked to a lawyer." Id. at 198, 109 S.Ct. at 2877-2878. Both in Prysock and in Eagan, this Court held that to determine the validity of a Miranda warning, "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda. Duckworth v. Eagan, supra at 203, 109 S.Ct. at 2880; California v. Prysock at 361, 101 S.Ct. at 2810. While the facts of both Prysock and Eagan comply with this holding, because suspects in these cases had been warned of their right to have counsel present during their custodial interrogations, those of the present case do not.

The State's argument, citing this Court's summary in the Miranda decision, id. at 478-479, 86 S.Ct. at 1630, is misleading. While the summary states the requirement of an attorney to "be appointed for [a suspect] prior to any questioning if he so desires," id, Petitioner confuses the appointment of counsel before the start of an interrogation with the right to the presence of counsel during such an interrogation. Furthermore, this summary in no way qualifies the requirements of Miranda, that is, the right to have a lawyer present during the custodial interrogation. Id. at 471-472,

86 S.Ct. 1626. In Dickerson v. United States, 530 U.S. 428, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000), this Court clarified that the Miranda decision's 'summary' of rights included the right to "the presence of an attorney" "during custodial interrogation." Id. at 435, 120 S.Ct. 2331.

Although Petitioner advances that the Miranda summation should be read in a common sense manner, as applied to the warning presently at issue, it fails to do so. The State argues that an average person would understand that the phrases;

> "You have the right to talk with a lawyer **and have a lawyer present** before any questioning' followed by "[i]f you cannot afford a lawyer, one will be appointed to represent you before any questioning if you wish," to mean an attorney will be provided before questioning for the purpose of having the attorney present during questioning.

However, the phrases quoted by Petitioner is a distortion of the actual warning given to Respondent. The undisputed facts are that Mr. Franklin was not given a general warning that he had the "right to talk with a lawyer," rather; he was specifically warned that he had "the right to talk to a lawyer before any questioning." Even when coupled with the subsequent warning, that if he could not "afford a lawyer, one will be appointed to represent [him] before any questioning," his opportunity to talk to his appointed lawyer was limited to a period of time before the interrogation began and the warnings given to Respondent provide no discernable inference that his interrogators would have allowed the lawyer to be present during the interrogation.

Petitioner's contention that the warning given to Mr. Franklin was a common sense recitation of what is required by Miranda ignores the obvious ambiguity within language of that warning. This Court has repeatedly asserted that the Miranda warnings are a general prophylaxis, Connecticut v. Barrett, 479 U.S. 523, 528, 107 S.Ct. 828, 831, 93 L.Ed.2d 920 (1987), against abuses inherent in custodial interrogations, Miranda v. Arizona, at 439, 468-469, 86 S.Ct. 1602, 1625, and, once properly given, provide a legal foundation upon which a statement given during a custodial

interrogation may be deemed voluntary. Dickerson v. United States, supra at 437-438, 120 S.Ct. 2333. So long as the waiver of these rights are valid, litigation concerning the voluntariness of such a statement ends with the fact that a proper recitation of the rights was provided to the suspect. Missouri v. Seibert, U.S. , 124 S.Ct. 2601, 2608, 159 L.Ed.2d 643 (2004). To the extent that the giving of a proper Miranda warning is a bright line rule, Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), it protects the Fifth Amendment rights of a criminal suspect, while providing a benefit to law enforcement in establishing the per se voluntariness of a custodial statement. Minnick v. Mississippi, 498 U.S. 146, 151, 111 S.Ct. 486, 490, 112 L.Ed.2d 489 (1990).

Once a suspect is properly informed of his rights, any invocation of those rights must be done in an unambiguous manner. In order for a suspect, once properly warned of his Miranda rights, to invoke his right for the presence of a lawyer during custodial interrogation, he must do so unambiguously and "articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney" for the interrogation to cease until an attorney is provided. Davis v. United States, 512 U.S. 452, 459, 114 S.Ct. 2350, 2355, 129 L.Ed.2d 362 (1994). The underlying purpose of requiring an unambiguous invocation of counsel is to prevent the Miranda safeguards from becoming an irrational obstacle to legitimate police investigations by forcing the interrogators to guess whether the suspects actual wants a lawyer or not. Id. at 460, 114 S.Ct. at 2355-2356.

But just as police are entitled to have an unambiguous invocation of the right to counsel in order for the cessation of questioning, there can be no ambiguity in the initial warning, to the extent that the suspect fails to be put on notice what his rights actually are, so that he may chose to invoke them. Id.; United States v. San Juan-Cruz, 314 F.3d 384, 387 (9th Cir. 2002)(Miranda requires meaningful advice in comprehendible language upon which a suspect can knowingly act. A valid

warning cannot be misleading; but rather, it must be clear and not susceptible to equivocation). In terms of what is necessary before a suspect can make a knowing waver of this Miranda rights, what is sauce for the government's goose, in terms of the no ambiguity in the invocation, is sauce for the suspect's gander, in that the warning, too, must leave no ambiguity as to the suspect's full compliment of rights. See, generally, United States v. Ortiz-Santiago, 211 F.3d 146, 151 (1st Cir. 2000).

Contrary to the State's contention, the warning given to Respondent was not legally sufficient, because it was ambiguous as to when Mr. Franklin had a right to counsel. The warning that he had the right to talk to a lawyer before questioning did not provide the meaningful advice upon which Respondent could have knowingly acted. The warning also failed to convey that Petitioner could stop talking or request an attorney, even after having had talked without counsel earlier. Missouri v. Seibert, supra, 124 S.Ct. at 2610. A suspect must be provided with the knowledge of his or her rights, as such is essential to the suspect's ability to understand the nature of his or her rights, as well as the consequences of abandoning them. Id. 124 S.Ct. at 2611. Unless the warning conveys to a suspect, who is about to be interrogated that he or she has a choice on when to invoke the right to counsel, the Miranda warning carries no force and fails to effectuate the per se voluntariness of a custodial statement. See Id., 124 S.Ct. at 2610. Mr. Franklin, having been told that he had the right to merely talk to a lawyer prior to the interrogation, was improperly kept ignorant of his right to the presence of counsel during questioning. This warning prevented Respondent from knowing of his right to counsel during the interrogation, which he could have evoked even after he had initially agreed to speak to police without counsel. Edwards v. Arizona, 451 U.S. 477, 483, 101 S.Ct. 1880, 1883-1884, 68 L.Ed.2d 378 (1981).

In Edwards, a suspect, after having been provided with a proper Miranda warning, which included the right to have counsel present during a custodial interrogation, waived that right and answered questions. Thereafter, during the interrogation, although he requested a lawyer, his request was ignored by police, the interrogation continued and he confessed to the crime of which he was subsequently convicted. Id. at 478-479, 101 S.Ct. at 1881-1882. This Court, in Edwards, recognized that a proper Miranda warning provides an accused with the right to the presence of counsel during a custodial interrogation. Id. at 482, 101 S.Ct. at 1883. To waive this right of counsel, the accused must necessarily do so knowingly and intelligently, to the extent that he has actual knowledge of the right he is abandoning. Id. at 483, 101 S.Ct. at 1884. Based on the foregoing, this Court went on to hold that;

> [W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he had been advised of his rights. We further hold that an accused... having expressed his desire to deal with police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communications, exchanges, or conversations with the police.

Id. at 484, 101 S.Ct. 1884-1885. This holding has been subsequently recognized as a "second layer of prophylaxis for the Miranda right to counsel," McNeil v. Wisconsin, 501 U.S. 171, 176, 111 S.Ct. 2204, 2208, 115 L.Ed.2d 158 (1991), and is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights." Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, 1180, 108 L.Ed.2d 293 (1990).

However, where, as in Respondent's situation, a defendant is merely told that he or she has the right to talk to a lawyer before questioning, the defendant's basis of knowledge concerning his or her rights is improperly limited. A defendant who is told that he or she can consult with a lawyer

only prior to the commencement of the interrogation cannot knowingly and intelligently waive the right to have a lawyer present during the interrogation and certainly cannot take advantage of or even waive the second layer of Miranda prophylaxis; to invoke right to counsel after initially agreeing to speak to police without the presence of a lawyer. Hence, contrary to Petitioner's contention, a waiver of Miranda rights based on a warning which limits a suspect's right to counsel to a time period prior to the start of questioning cannot be voluntary. Edwards v. Arizona, supra at 483, 101 S.Ct. at 1884.

Petitioner's discussion concerning "'compulsory self incrimination'" and the lack of coercion against Mr. Franklin by police has no relevancy to this Court's determination. This Court has made it quite clear that a proper Miranda warning establishes a threshold determination of voluntariness and renders admissible a statement taken during a custodial interrogation. Dickerson v. United States, supra at 434-435, 120 S.Ct. at 2331. Not only is the State's point without merit, its citation to Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966) is of no value as applied to the present issue, since it was a decision based on pre-Miranda law. Also, its reliance on Michigan v. Tucker, 417 U.S. 443, 94 S.Ct. 2357, 41 L.Ed.2d 182 (1974), is irrelevant, as this case concerns whether the fruit of the poisonous tree doctrine should apply to custodial statements which are suppressed due to a Miranda, violation.

The Fourth District's decision does not evince a "talismanic" incantation regarding Miranda warnings. Contrary to Petitioner's argument, Prysock does not stand for the proposition that "a Miranda warning is adequate if it fully informs the accused of his right to consult with an attorney only prior to questioning." In fact, as discussed, above, Prysock holds for exactly the opposite, id. at 360-361, 101 S.Ct. at 2810, and the Eleventh Circuit, in United States v. Contreras, 667 F.2d 976, 979 (11th Cir. 1982), citing to Prysock, recognized that a warning which conveyed to a suspect his

right to the presence of counsel during the interrogation was a necessary component of a Miranda warning.

The State's assertion that, "It is axiomatic that Miranda jurisprudence demands that the totality of the circumstances be considered in determining whether a Miranda warning is adequate to inform a suspect of this rights," is plainly wrong. In fact, it was the Miranda decision, itself, which cast aside the totality of the circumstances, or due process, analysis concerning the threshold determination whether a custodial statement was voluntary and replaced it with the four part warning. This Court in Miranda held that the four warnings are

> [A]n absolute prerequisite to interrogation. No amount of circumstantial evidence will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

Id. at 471-2, 86 S.Ct. at 1626. The Miranda court went on to hold that unless the prosecution can show that the four warnings are given and a valid waiver of rights obtained, the results of a custodial interrogation cannot be used against an accused. Id. at 479, 86 S.Ct. 1630. In Prysock, this Court "stressed" that "one of the virtues of Miranda [is] the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admission of the accused." Id. at 359, 101 S.Ct. at 2809. Then, in Dickerson, this Court reaffirmed that the due process, totality of the circumstances test to determine threshold voluntariness of a custodial statement has been replaced by the four Miranda rights warning. Id. at 434, 120 S.Ct. at 2331. While the due process jurisprudence remains available to prove that a confession was elicited involuntarily, such an analysis is undertaken only after it is proven that a proper Miranda warning was given. Id.

The authority cited by Petitioner fails to support its proposition that Miranda jurisprudence requires a totality of the circumstances test to determine a warning's adequacy. Its reliance on Frasier v. Cupp, 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969) is of no consequence, since it

concerned pre-Miranda law, id. at 738, 89 S.Ct. at 1424, and Miranda does not have retrospective application. Johnson v. New Jersey, supra at 733, 86 S.Ct. 1781. United States v. Fox, 403 F.2d 97 (2nd Cir. 1968), was a case where the Second Circuit held that the Miranda warning given to the accused was legally insufficient and reversed a conviction, holding that his confession was inadmissible as to both direct and collateral evidence of the accused's guilt. Id. at 102-103. The remaining cases authorize the utilization of a totality of the circumstances analysis to determine the adequacy of a Miranda rights waiver, not the adequacy of the warning, itself. Brown v. Crosby, 249 F.Supp.2d 1285 (U.S.S.D. Fla. 2003); Globe v. State, 877 So.2d 663 (Fla), rehearing denied, 29 Fla. L. Weekly S345 (Fla. March 18, 2004); Thompson v. State, 548 So.2d 198 (Fla. 1989). The adequacy of a Miranda warning is determined by its content. As stated, "The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by Miranda." Duckworth v. Eagan, supra at 203, 109 S.Ct. at 2880; California v. Prysock, supra at 361, 101 S.Ct. at 2810. The warning given to Mr. Franklin, which limited his ability to talk with a lawyer to a time period before the interrogation, failed to reasonably convey his Miranda rights.

Petitioner cites to various Circuit Courts of Appeal decisions which hold that a proper Miranda warning need not explicitly include language stating that the suspect has a right to counsel present during questioning. The Fourth District's decision, however, does not conflict with the decisions of these Circuit Courts of Appeal. Based on these lines of precedent, those same federal appellate courts would also hold that the warning given to Mr. Franklin, that he could speak to a lawyer before questioning, was contrary to Miranda and legally inadequate.

In United States v. Burns, 684 F.2d 1066 (2nd Cir. 1982), United States v. Adams, 484 F.2d 357 (7th Cir. 1973), and Sweeney v. United States, 408 F.2d 121 (9th Cir. 1969), the courts similarly held that a general warning that a suspect had a right to an attorney, a right to counsel or that he was

entitled to an attorney, was not deficient to convey a Miranda warning, because such a general statement concerning the right to a lawyer, when taken on a whole with the other warnings, United States v. Burns, supra at 1074, and specifically the warning that anything said can be used as evidence against the accused, was sufficient to infer that the right to counsel also applied during the interrogation. Sweeny v. United States, supra at 124. The general admonishment of 'the right to a lawyer,' within the context of the remaining three warnings sufficiently "communicate[s] to [the suspect] that his right to an attorney began immediately and continue[s] forward in time without qualification." United States v. Frankson, 83 F.3d 79, 82 (4th Cir. 1996). An unqualified right to a lawyer is sufficient to apprise a suspect of this right to counsel during custodial interrogation and complies with the Prysock adequacy analysis, id. at 81-82, which forbids limitations being placed on the right to have an attorney present before and/or during questioning. California v. Prysock, supra at 360-361, 101 S.Ct. 2809-2810; United States v. Caldwell, 954 F.2d 496, 501 (8th Cir. 1992)(a general, unqualified warning of an unlimited right to a lawyer sufficiently conveys the right to have counsel present during interrogation).

The foregoing decisions, which hold that a generalized and unqualified Miranda warning is legally adequate, are inapplicable to the facts at bar. The words used to convey the warning to Respondent improperly placed qualifications and limitations on his "'right to a lawyer before [being] questioned... [and] while... being questioned, and all during the questioning." Id. at 360-361, 101 S.Ct. at 2810 [citation omitted].[2] The warning specifically limited Mr. Franklin's right to a lawyer to a period of time prior to the start of the interrogation. Once told, "You have the right to talk to

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[2] It appears, according to Prysock, that a Miranda warning which explicitly or inferentially excludes the right to have a lawyer during questioning is invalid. Quoting from United States v. Noo, 443 F.2d 144 (9th Cir. 1971), a case consisting of similar facts, the Prysock Court remarked that "'[t]his is not a case in which the defendant was not informed of his right to the presence of an attorney during questioning.'" Id. at 361, 101 S.Ct. 2810; United States v. Noo, 443 F.2d at 146.

a lawyer before any questioning," there is no basis to infer that this lawyer will also be present during questioning. Its content leaves the impression that a suspect may only speak with counsel before the interrogation begins and, thereafter, the lawyer is not going to be permitted into the interrogation room to hear the questions being asked or protect the suspect from its inherently coercive atmosphere. Miranda v. Arizona, at 446-458, 86 S.Ct. 1612-1619.

The state's citation to Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), and United States v. Cusumano, 429 F.2d 378 (2nd Cir. 1970), also fail to support its contention. In Coyote, the suspect was warned, "that before making any statement he could consult with a lawyer of his own choice and in the event he was without funds to hire a lawyer, the judge would appoint or provide one for him." Id. at 307. The Tenth Circuit found this warning was adequate, since it conveyed meaningful advice as to the Miranda rights to the extent that an accused could act knowingly regarding these rights. Id. at 308. In Cusumano, the defendant and his co-defendant were warned that "They are entitled to an attorney to be present while they made any statements." Id. at 379. The Second Circuit found that this warning inferred that the suspects had an unqualified right to the presence of counsel which included during the custodial interrogation. Id. at 380. While these cases were pre-Prysock decisions, the results, now, would be the same. These warnings are adequate, not necessarily because they infer the right to counsel during question, but because they explicitly provide for such. Within the context of an interrogation, questions are asked and answers are given. The right to consult with counsel before making a statement necessitates the presence of counsel when the question that elicits the statement is asked. Statements made by suspects which are not prompted by police custodial interrogation questioning are not subject to Miranda protection. Rhode

Island v. Innis, 446 U.S. 291, 300-301, 100 S.Ct. 1682, 1689-1690 64 L.Ed.2d 297 (1980); see also United States v. McCoy, 200 F.3d 582, 584 (8th Cir. 2000).[3]

Petitioner accuses the Circuit Courts of Appeal, which hold that an adequate Miranda warning must explicitly impart the right to the presence of a lawyer during the interrogation, of having chosen "to unjustly expand Miranda." This is simply preposterous. What these federal appellate courts, such as the Ninth Circuit, in United States v. Noti, 731 F.2d 610 (9th Cir. 1984), and the Fifth Circuit, in Windsor v. United States, 389 F.2d 530 (5th Cir. 1968), require is no less than what is required by a plain, literal reading of both Miranda and Prysock, that a suspect, during a custodial interrogation, must be informed that he or she has the unqualified right to the presence of a lawyer. Id. at 471-472, 86 S.Ct. at 1626; California v. Prysock, at 360-361, 101 S.Ct. 2810. These lines of authority do not require, as Petitioner ridiculously asserts, that the warning include the right to counsel "every single minute of every day that [the accused's] case is pending." But more importantly, while the decisions in Noti, Windsor, and the like may superficially conflict with holdings in Sweeny, Burns, and Adams, substantively they all agree that a Miranda warning must be unqualified and without limitation with regard to a suspect's right to the presence of a lawyer during custodial interrogation. This is what is required by Miranda, and Prysock.

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[3] The State also relies on United States v. Vanterpool, 394 F.2d 697 (2nd Cir. 1968), and United States v. Hernandez, 93 F.3d 1493 (10th Cir. 1996). The precedential value of Vanterpool is dubious, since the statement, elicited by a prosecutor's interrogation of the defendant in his office, prior to the effective date of Miranda, was not used to prove the defendant's guilt, but only to impeach his credibility. Id. at 698-699;see also Michigan v. Harvey, 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990)(statements elicited in violation of the prophylactic Miranda warning, while not admissible to prove guilt, are admissible to attack the accused's credibility by impeaching his trial testimony which may be false or inconsistent with a former police statement). In Hernandez, while a Miranda warning was less than artfully translated from English to Spanish, its substance explicitly conveyed to the suspect that he had the right to the presence of counsel before and during questioning. Id. at 1497, 1502.

While the decision at bar of the Fourth District is in line with Noti and Windsor, strictly construed Miranda as requiring an explicit warning concerning an accused's right to the presence of counsel during an interrogation, there is no conflict with the authority which approves of a general, unqualified and unlimited warning, which implicitly conveys the suspect's right to the presence of counsel during questioning. The warning given to Mr. Franklin limited and qualified his right to speak with a lawyer to only before he was interrogated. Under both lines of authority, the warning was legally inadequate to convey to him his Miranda rights and decision of the Fourth District was correct.

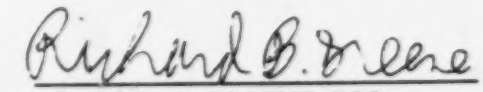
Interestingly, the Broward Sheriff's Office Miranda warning, see West v. State, 876 So. 2d 614 (Fla. 4th DCA 2004), did not always limit a suspect's right to speak to counsel to a time period prior to questioning. Franklin v. State, supra. Back in 1991 and at least through 1996, this law enforcement agency's standard Miranda warning provided that an accused had the right to speak to a lawyer before speaking to police and the right to have a lawyer present during questioning. Brown v. Crosby, supra at 1305 n.11. The Broward Sheriff's Office subsequently changed its Miranda warning sometime prior to 2001 to the form given to Respondent. Id. While the change may have been due to an innocent oversight, it could have also been by nefarious design to circumvent the requirements of Miranda by limiting suspects knowledge of the scope of their right to counsel during custodial interrogation. See Missouri v. Seibert, supra, 124 S.Ct. at 2612-2613 (police strategies which are designed to remove the substance out of Miranda warnings are improper and will not be tolerated by this Court). If the Broward Sheriff's Office Miranda warning given to Respondent was changed in order to circumvent the requirements of Miranda, then there would be no validity in the warning given to Mr. Franklin and his statement would necessarily be deemed involuntary. Id.

The warning given to Mr. Franklin did not track Miranda requirement that an accused must be informed of his or her right to the presence of counsel during questioning; nor did it track those general, unqualified warnings which implicitly imparted this right. The language did not impart to Mr. Franklin his right to the presence of counsel during questioning, because it specifically limited, to before questioning only, his right to speak to and have contact with a lawyer. The decision of the Fourth District does not conflict with any Circuit Court of Appeal and this Court should decline review and deny the Petitioner's request for a writ of certiorari.

CONCLUSION

The decision of the Fourth District Court of Appeal of Florida is consistent with this Court's holdings in Miranda v. Arizona, supra and California v. Prysock, supra. It does not conflict with any decision in any Circuit Court of Appeal. This Court's certiorari review is unwarranted and should be denied.

Respectfully submitted,



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